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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1924—NOS. 199, 200, 201.

AUSTIN NICHOLS & COMPANY, EUG. SANCHEZ and JOSE GILDE SAGREDO, co-partners trading as E. Sanchez & Company, and E. TOLIBIA & COMPANY,

Petitioners,

—against—

Steamship "ISLA DE PANAY"; COMPANIA TRASATLANTICA,

Claimant-Respondent.

BRIEF FOR PETITIONERS.

T. CATESBY JONES,
JAMES W. RYAN,
Counsel for Petitioners.

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Petitioners,

—against—

Steamship "ISLA DE PANAY"; COMPANIA TRASATLANTICA,

Claimant-Respondent.

BRIEF FOR PETITIONERS.

Statement of the Case.

This case is here on certiorari to the United States Circuit Court of Appeals for the Second Circuit, the petition having been granted by this Court at the October 1923 Term. The Circuit Court of Appeals affirmed a decree of the District Court for the Southern District of New York dismissing three libels against the steamship *Isla de Panay*. The libels were in the usual form for cargo damage, and alleged that the goods had been shipped on the *Isla de Panay* as a common carrier at Cadiz, Spain, in good order and

condition, to be carried in like good order and condition to the libellants at New York in accordance with the terms of bills of lading issued for the shipments. The libels further alleged that when the cargo was discharged it was not in like good order and condition as when shipped, but was badly damaged. The Compania Trasatlantica filed a claim to the *Isla de Panay* as sole owner, and obtained her release by filing a bond or stipulation for value promising as principal, with a surety company as surety, to pay the amount of the libellants' claims if so decreed. The Compania Trasatlantica, as claimant and owner, then filed an answer admitting that the bills of lading constituted a contract with the *Isla de Panay* (Answer, par. 9; Record, p. 12) and setting up that the damage was due to frail containers, and that it had exempted itself from liability for frail containers by a clause in the bills of lading.

The testimony of several witnesses was taken by deposition on behalf of the claimant, and later commissions were issued to Spain by the claimant to take the testimony of witnesses residing there. These commissions were not returned until March 18th, 1922. On October 3rd, 1922, the causes came on for trial. Several witnesses were called at the trial, and, on October 23rd, the District Court filed its written opinion, which will be found at page 222 of the record. The final decree was entered on November 9th, 1922. On July 27th, 1923, the Circuit Court of Appeals filed its opinion affirming the decree of the District Court.

Statement of Facts.

The libellants, the petitioners here, purchased three lots of green olives packed in brine from exporters in Seville, Spain.

> "The money was placed in Seville at the time we made our purchase, and was made available for his drafts in connection with a clean bill of lading.
>
> Q. You sent the money in advance on which he could draw for a clean bill of lading? A. Yes, in other words, a letter of credit was opened.
>
> Q. Under your arrangement, would he have been able to draw on a bill of lading which was not clean? A. He would not" (Record, p. 26).
>
> "Q. The money was paid in advance? A. I don't know as you could say that. It was paid after the shipment had been made in exchange for documents.
>
> Q. Who has charge of the paying of the money in Spain. Did you have an agent in Spain? A. We opened our letter of credit with the correspondent of the Irving National Bank, and they paid it.
>
> Q. What is the authority in this matter besides that? A. Letter of credit recites that, in exchange for a bill of lading and other documents, he shall honor the draft of the holder, in this case, Rowlett Pyman & Company" (Record, p. 27).

The Spanish exporters, Messrs. Rowlett y Pyman and others, delivered the 354 casks containing the

three lots of olives at a wharf at Seville to the Compania Trasatlantica as owner of the *Isla de Panay* (Record, p. 144). The *Isla de Panay* was a passenger, mail and cargo steamer engaged in general service as a common carrier of goods between Spanish ports and New York (Record, pp. 103, 91 and 10). She regularly called at Cadiz at the mouth of the Guadalquivir River. Seville is 70 or 80 miles up the river from Cadiz. Seville shipments for the *Isla de Panay* are lightered down the river on the 500 cubic meter steamer *Moyador* (Record, pp. 17 and 151), also owned by the Compania Trasatlantica. The 354 casks when shipped by the sellers, although all unbroken, were frail and obviously in very bad condition and unfit for carriage (Record, pp. 157, 152, 158). Each cask was five feet long, four feet in diameter at the bilge, and weighed 750 kilos (Record, pp. 64, 156, 95). The captain of the lighter and the stevedores observed the bad condition and rejected the casks (Record, pp. 167, 152, 157, 158, 166, 172, 174, 178, 179, 190). The trade usage required notations on the bills of lading if the goods were apparently in bad condition (Opinion, C. C. A., Record, pp. 238, 239; Opinion, D. C., Record, p. 222; Record, pp. 167, 166, 174, 212, 144, 145, 146, 97). After the rejection by the captain of the lighter, the shippers induced the *Isla de Panay's* agent, Benjumea, to accept the casks for carriage and to violate the usage by issuing clean bills of lading (Record, pp. 210, 212).

The casks were loaded on the *Isla de Panay* at Cadiz "day and night" on November 4th and 5th, 1917 (Record, p. 81). She sailed from Cadiz with

the casks on board at 5 P. M. on November 5th (Record, pp. 81, 98). The bills of lading, although dated October 27, 1917, were not issued or delivered to the shippers until November 5th and 8th, 1917, after guarantees executed by the shippers on November 5th and 8th had been delivered and after the casks had been loaded on the *Isla de Panay* (Record, pp. 214, 212, 213, 152, 153, 220, 221). The bills of lading stated that the casks had been "shipped on board the Spanish steamer *Isla de Panay*" (Record, p. 215, photostat of Bill of Lading). The printed clauses of the bills of lading (all of which were in Spanish; see photostat of Bill of Lading, Record, p. 215) did not recite that the goods were shipped in apparent good order and condition. The bills of lading, as issued, however, contained no notation that the condition of any of the casks was bad or was such as to render them unfit for carriage (Record, p. 215). Such bills of lading are by trade usage regarded as "clean" (Opinion, C. C. A., Record, p. 238; Opinion, D. C., Record, p. 222). A "clean" bill of lading "indicates that the merchandise was in good condition when it was received from [by] the steamship company" (Opinion, C. C. A., Record, p. 238; Record, p. 25). The captain of the *Isla de Panay* and her agent, Benjumea, knew that the purpose of concealing the bad condition by making no notation on the bills of lading was to enable the shippers to sell the bills to the consignees as evidence that the casks were shipped in good condition (Record, pp. 146, 210, 212; Opinion, C. C. A., Record, pp. 233 and 238). They also knew that the consignees would in

ordinary course pay for the casks as sound on the faith of the bills of lading before having an opportunity to observe their actual condition.

Captain Muslera of the *Isla de Panay* in answer to the question, "Captain, why are these letters of guarantee given in Seville?" testified as follows:

> "If the bills of lading are issued with a note on them the insurance companies or the bankers in Spain will not accept that bill of lading on account of the condition in which the goods are, but if they have no clause on it THEY WILL PASS IT TO A BANKING HOUSE AND THE INSURANCE COMPANY THAT THEY HAVE BEEN SHIPPED BY THE SHIPPER IN APPARENT GOOD ORDER AND CONDITION, although they have issued a letter of guarantee relieving the company of any responsibility whatsoever for the condition of the packages" (Record, p. 146; Opinion, C. C. A., Record, p. 233). (Capitalization ours.)

See also Record, page 212.

There is nothing on the faces of the bills of lading to indicate to a prospective purchaser that "A. Pastrana," whose name is signed at the bottom as "El Capitan," was not the captain of the *Isla de Panay* (Record, p. 215). The bills of lading were not signed or issued by Pastrana, the captain of the *Mogador,* as the Circuit Court of Appeals inadvertently said (Opinion, C. C. A., Record, p. 232). The bills of lading were issued

in the name of the *Isla de Panay* and were signed solely by Agent Benjumea of the *Isla de Panay* by affixing two rubber stamp signatures on the bills, one reading, "The Captain, A. Pastrana," and the other reading, "The Agent of the Steamer (round stamp) Compania Trasatlantica, Sevilla Agency." Pastrana testified:

> "The bills of lading are exclusively issued by the agent and are signed with a rubber stamp bearing my name. • • • I did not issue, as before stated, the bills of lading, this being done by the agent only" (Record, pp. 152, 168). "I do not issue bills of lading" (Record, p. 168).

The agent, Benjumea, testified:

> "I was acting in the capacity of agent of the Compania Trasatlantica through the power of attorney, copy of which is annexed hereto and marked Exhibit No. 1" (Record, p. 208). "I issue the bills of lading only" (Record, p. 214).

Benjumea further testified that he was authorized to sign bills of lading "as agent" for the captain of the *Isla de Panay* in "the latter's absence" (Record, p. 211). Moreover, Captain Muslera of the *Isla de Panay* specifically admitted that "the shipment of olives in this case was received by the Spanish Line as owners of the *Isla de Panay* at Seville" (Record, p. 144).

Benjumea agreed to and did (Record, pp. 210, 211, 146) name innocent consignees at New York in the bills of lading and omitted notations of

the bad condition of the casks in consideration of secret guarantees by the shippers against the expected claims of the innocent consignees based on "the damages that they [the casks] suffer as natural consequences of the voyage" (Record, p. 221).

These guarantees or letters of indemnity were delivered on November 5th and 8th, 1917, and are printed as Claimant's Exhibits on pages 220 and 221 of the Record. A typical one reads as follows:

"Sevilla, November 5, 1917.

Compania Trasatlantica,
Sevilla.

My dear Sirs:

With reference to the shipment of 227 casks of olives that we are making by the steamer *Isla de Panay* to New York, we understand that that Company considers the containers insufficient and that it does not accept responsibility for the damages that they suffer as natural consequences of the voyage.

And as guarantee of that Company, we sign the present, as you have delivered us clean bills of lading.

Yours very truly,

ROULETT & PYMAN"
(Record, pp. 221, 220).

Two hundred and eighty-five of the casks, "in bad condition," were carried by the *Mo-*

gador down the river to Cadiz and loaded alongside on the *Isla de Panay* (Record, pp. 165, 154, 152). The remaining 69 casks, also "in bad condition," were carried by railway "at shipper's risk" to Cadiz and lightered to the *Isla de Panay* (Record, pp. 155, 156, 210). The captain of the *Mogador* testified that the entire 354 casks were in absolutely the same condition when delivered to the *Isla de Panay* at Cadiz as when received at Seville, no further damage having taken place during the lighter and railway carriage (Record, pp. 154, 155). The captain of the *Isla de Panay* testified that all the casks, although unbroken, were "in very bad condition" (Record, pp. 75, 88, 80, 78, 79, 83, 87) when loaded on the *Isla de Panay*, and that "If I was the shipper of those olives I would never have shipped them in a container such as these, because they would never reach their destination" (Record, p. 80). He shortly afterwards qualified this by saying:

> "That they were old I can say, but I cannot say that they would never reach their destination.
>
> Q. What did you say a moment ago that these containers would never deliver their contents to destination? A. Because I reduce that from the fact, although they were taken on board and very carefully handled, when they were taken out at New York the bad condition in which they were in.
>
> Q. You have been testifying then for the last few questions and answers merely to your deductions, is that the idea? A. No" (Record, p. 80).

The captain of *Isla de Panay* further testified that when the casks were loaded at Cadiz "they were in very bad condition and very old" (Record, pp. 80, 75, 79, 83, 87, 88). The hoops on the casks were so "rusty I could not tell what they were made of" (Record, p. 82); "I am not used to seeing rusty hoops" (Record, p. 82); "You could see that they were very old * * * that the heads were warped, deformed, that they were in very bad condition" (Record, p. 75); "The wood in these was very soggy" (Record, p. 79); "Q. You think those barrels were 20 years old, do you? A. Yes, sir" (Record, p. 79). They were the oldest casks he had "ever seen carrying olives across the Atlantic" (Record, p. 80). "I am not a cooper to say exactly whether the casks were 20 years or 2 years, but from what I saw they were in very bad condition and very old" (Record, p. 80). The other officers of the *Isla de Panay* and the captain of the *Mogador* confirmed the testimony of the captain of the *Isla de Panay* that the casks were in very bad condition and unfit for carriage (Record, pp. 158, 107, 96, 157, 152, 167, 172, 174). The chief officer, the second officer and the carpenter of the *Isla de Panay* also testified that the casks while being "taken aboard and stowed at Cadiz" (Record, p. 107) were leaking, the staves being somewhat apart (Record, pp. 96, 97, 107, 122, 129), and that "some of the hoops broke open and others came off the ends of the casks" while being loaded (Record, pp. 114, 131, 129, 130). No attempt was made to replace the unbroken hoops that had fallen off or to substitute new hoops for those

that broke (Record, pp. 114, 115). The chief officer testified that 325 of the 354 casks were in bad condition (Record, p. 111).

The captain and the second officer of the *Isla de Panay* noted the bad and leaky condition of the casks on the steamship company's secret, inter-agent shipping orders, but failed to note it on the bills of lading (Record, pp. 76, 79, 97, 111). No re-conditioning of the casks was required at any time by the captain or any agent of the *Isla de Panay* or her owner other than the apparently voluntary action of the shippers' cooper in tightening or putting pressure on some of the rusty hoops and in inserting slips of paper between the staves of some of the casks to try to stop leakage "for the time being" (Record, pp. 152, 158, 159, 160). But "all this excessive force was detrimental to the hoops" (Record, p. 160). When pressed as to what re-conditioning of the casks he demanded from the shippers' cooper, the captain of the *Isla de Panay* testified, "I did not talk to the cooper" (Record, p. 88). No demand was made that new hoops be substituted for any of the fifty per cent. (Record, p. 85) which on arrival at New York "if you just touched them [the rusty hoops] they would fall off" and "break off" (Captain of the *Isla de Panay,* Record, p. 77); the heads "were warped and deformed and as the hoops broke off, the weight of the casks being so great, the heads would pop out" (Captain of the *Isla de Panay,* Record, p. 78).

The captain of the *Mogador* testified that it was "customary" for the ship's carpenter of the *Isla de Panay* to recondition leaking casks by "tighten-

ing" the hoops (Record, p. 160); and that if any casks broke or fell apart while loading, "they would have been repaired by the carpenter of the *Isla de Panay*" (Record, p. 165). The chief officer of the *Isla de Panay* testified, however, that not only the broken but also all the loose hoops that fell off the casks while being loaded on the *Isla de Panay* were "thrown away" (Record, p. 114) as "nothing but rubbish" (Record, p. 115), and that the man who was carpenter of the *Panay* was incompetent to replace the hoops (Record, p. 115). The carpenter of the *Panay* testified that the casks were leaking and many of the hoops "came off from all over the barrels" while being loaded on the *Panay*" (Record, pp. 123, 128, 130), but he did not testify that he or any one else replaced them.

The *Isla de Panay* encountered no unusual weather or seas on the voyage to New York.

The captain of the *Isla de Panay* further testified that after the ship arrived at New York when discharging began the hoops on the casks broke and came off "in the hold while they were up in the air and being hoisted and in dock" (Record, p. 78); and that "as the hoops broke off, the weight of the casks being so great, heads would pop out" (Record, p. 78); "You touch them [the casks] only and the hoops would come off and the head would come out and the olives would come all over the dock. They were shoveled back into the casks and set on their heads, put the hoops around them, salt and water, put the head back in order to try to preserve the olives. Out of every two that were unloaded, one would come

apart" (Record, p. 85; see also Record, pp. 77, 86). The ship's evidence showed that this was the only breakage that took place either before or during the voyage (Record, pp. 154, 155, 98).

Both Courts below found that the bills of lading were "clean" (Record, pp. 222, 238, 239) and that the consignees "paid drafts accompanying the bills of lading without knowledge that the containers were old and insufficient" (Record, pp. 222, 239). They further found that the breakage resulted from the frail and unfit condition of the casks at the time the ship accepted them and agreed to carry them to New York. The Courts then concluded that because the ship had not directly represented by a printed clause in the bills of lading that the casks were "in apparent good condition," the petitioners had not sustained the burden of showing a direct misrepresentation, which it held was an essential element of estoppel. The Circuit Court of Appeals, although the point had not been raised nor argued, also added that although the shipowner might be liable in *personam*, the ship was not liable *in rem*. This part of its decision was based on an assumption by the Court that "the bills of lading issued for the casks of olives were issued at Seville by the captain of the *Mogador*. They were not signed at any time by the captain of the *Isla de Panay*" (Record, p. 232), and that the bills of lading "were not signed by any officer of the *Panay* but bore the signature of the captain of the *Mogador*" (Record, p. 235) and therefore "whether the shipowner would have been estopped if the master of the *Panay* had signed the bills of lading is a question not before

us" (Record, p. 241). As appears from the foregoing statement of facts, the Court overlooked the fact that the bills of lading were not issued by the captain of the *Mogador,* but by Agent Benjumea of the *Isla de Panay* in her name (Record, pp. 152, 215, 218, 144).

> *The statement of counsel for the Isla de Panay at page 3 of his brief in reply to the petition that "The casks here were in apparent good order and condition when received for shipment by the respondent in Seville" is in conflict with the findings of both Courts below and with his own evidence.*

Counsel for the *Isla de Panay* at page 3 of his brief in reply to the petition for certiorari, says:

> "The casks here were, as a matter of fact, in apparent good order and condition when received for shipment by the respondent in Seville."

This statement is immaterial, because admittedly the casks were in apparent bad condition when the bills of lading were issued and delivered to the shippers on November 5th and 8th, 1917. Moreover, this statement of counsel is in conflict with the findings of both Courts below and with the *Isla de Panay's* own uncontradicted testimony. The Circuit Court of Appeals found as follows:

> "The merchandise at the time it was placed on the *Mogador* was in casks which were seen to be so old, weak and defective

> that those in charge at Seville objected to accepting them and the shippers thereupon offered letters of guarantee to take the place of any notations on the bills of lading" (Record, pp. 235 and 236, Opinion C. C. A.).

The District Court found as follows:

> "I think the great weight of evidence is to the effect that the chestnut casks containing the olives were old and insufficient at the time the merchandise left Seville. * * * The steamship company distrusted the containers and insisted upon an agreement of indemnity as a condition of carrying the merchandise under clean bills of lading, which seems to have been given at Seville" (Record, p. 222, Opinion, D. C.).

Moreover, Captain Pastrana of the *Mogador*, who received the casks for the respondent at Seville, testified on direct examination as follows (Record, p. 154):

> "Q. Were the casks containing the merchandise in question damaged in any way while being loaded in the *Mogador,* transported from Seville to Cadiz or while being unloaded from the *Mogador* to your knowledge? A. As just stated, these casks did not suffer any further damage during their loading and transportation on the *Mogador* and their transshipment to the *Isla de Panay.*" (See also pp. 154 and 155 of the Record.)

Pastrana further testified that at Seville:

> "I made a personal inspection sufficient to convince myself of their bad condition. It was not necessary to handle them in order to see their defects" (Record, p. 157); "It was always my practice to make such inspection in order to relieve my Company and myself of responsibility and also as it was my duty, as sole deck officer, and captain, to do so" (Record, p. 157).
>
> The olives "were contained in casks whose outside condition was as follows: (a) the staves were considerably worn and distorted; (b) the hoops were very rusty and, as a consequence, thin; (c) the heads of some of the casks appeared to be convex and others concave with irregularities; (d) brine was leaking from many of the casks which coopers, sent to the dock by the respective shippers, were attempting to stop and prevent further leakage; (e) the casks appeared to be old and weak and were made of chestnut wood and consequently frail; (f) As above stated the casks were repaired on the wharf before being loaded by the coopers of the shippers who repaired the leaks by stuffing paper between the staves. This stopped the leaking for the time being" (Record, p. 152).
>
> "The defective condition of these hoops was apparent to the eye. I could see, without making further investigation due to my experience with containers of this kind, that they were in bad shape. I do not

remember the thickness of the rust" (Record, p. 158).

"My duty as captain is to notify the company of abnormal or bad condition of the cargoes received by me through written orders from the Company. It is the Company that takes the necessary steps to prevent any responsibilities being charged against the Company or the ship" (Record, p. 166). "Objections to the bad condition of the casks were made by the Foreman, Diego Garcia, and myself" (Record, p. 167). "I spoke to the shipper's foreman regarding the bad condition of the casks and refused to take them unless a notation was made on the bills of lading or a consultation held with the agency. I notified the agency of this through the foreman Diego Garcia" (Record, p. 167).

Garcia, a foreman stevedore, who loaded the casks on the *Mogador* at Seville, testified:

The olives were "contained in casks and all of them, those shipped on the *Mogador* as well as those shipped by rail had the same defects, *i. e.*, that the containers were deficient, offering little guarantee of their good arrival in New York" (Record, p. 172). The staves of the casks were "old and weak" (Record, p. 172); the hoops were "rusted and thin" (Record, p. 172). The condition and appearance of the heads of the casks "was bad" (Record, p. 172); "brine was leaking from some of the casks" (Record, p. 172). "In view of the old and

weak condition of the casks, in my own name and that of the *Mogador's* captain, I informed the agent of their bad condition having understood that the agency had pointed out the necessity of making notations on the bills of lading and that the shippers had offered letters of guarantee to take the place of such notations" (Record, p. 174). The heads of the casks were "not broken but they were warped and leaking" (Record, p. 178); "some of them [the hoops] were broken but they were replaced before shipping" (Record, p. 178). Brine was leaking from some of the casks "but I cannot say the exact number" (Record, p. 178). "The looking over of these casks coupled with my long experience with such matters assured me that they were in bad condition" (Record, p. 179). "The bad condition of these casks was clearly seen on moving them and on seeing their warped heads and staves, rusty and thin hoops and the leaking which the shippers' coopers tried to stop" (Record, p. 179). "The captain of the *Mogador* and I myself made objections to the bad condition of the casks" (Record, p. 190). We made the objections "to the foreman of the shippers and to the agent of the *Isla de Panay*" (Record, p. 190). "The substance of what I said to the foreman and to the agent was that the casks were in such bad condition as not to be accepted without notation" (Record, p. 190).

See also the testimony of Boatswain Montiel of the *Mogador* (Record, pp. 174, 178, 179).

The questions for review by this Court are as follows:

> "I. The decision of the lower Courts that although the petitioners were defrauded there can be no estoppel unless there is an express representation by a recital in the bill of lading, is directly contrary to the decisions of this Court and of the Circuit Court of Appeals of other Circuits that an estoppel need consist only of a concealment of a material fact by a person under a duty to disclose it, resulting in prejudice to the person from whom the information has been withheld.
>
> If the *Isla de Panay's* agent were entirely innocent of misrepresentation or fraud, the *Isla de Panay* should nevertheless be held liable under the rule that where one of two innocent parties must suffer, he must bear the loss whose act put it in the power of the third party to commit the wrong.
>
> II. The decision of the Circuit Court of Appeals, *sua sponte,* without suggestion of any counsel, that the *Isla de Panay* was not liable *in rem,* is in direct conflict with the decision of this Court in *Bulkley* v. *Naumkeag Steam Cotton Company,* 24 Howard 386, which was not mentioned in the opinion of the Circuit Court of Appeals. It also inadvertently overlooked the facts that the bills of lading were issued in the name of the *Isla de Panay* and were not

delivered to the shippers until after the casks of olives had been loaded on board the *Isla de Panay* on November 4th and 5th, and that they were actually stamped and issued not by the captain of the *Mogador* but by Jose Benjumea, a duly authorized agent of the captain of the *Isla de Panay*" (Petition, pp. 1 and 8).

POINT I.

The decision of the lower courts that although the petitioners were defrauded there can be no estoppel unless there is an express representation by a recital in the bill of lading, is directly contrary to the decisions of this Court and of the Circuit Courts of Appeals of other circuits that an estoppel need consist only of a concealment of a material fact by a person under a duty to disclose it resulting in prejudice to the person from whom the information has been withheld.

Counsel for the respondent, at page 12 of his brief in reply to the petition for certiorari, states the question involved as follows:

> "The precise question presented herein is whether a carrier which receives for shipment apparently defective containers and issues a bill of lading therefor which states nothing one way or the other about their condition, is estopped as against an innocent purchaser of the bill of lading from proving the containers insufficient. This

question has never been previously presented to any court in the United States."

The question as thus stated ignores the admission of the Captain of the *Isla de Panay* that the purpose of the ship in violating the trade usage by issuing the bills of lading without any notation regarding the apparent defects of the casks was to conceal their apparent bad condition and thus enable the shippers to sell the bills to the consignees as "clean" and as representing that the casks when accepted for carriage were apparently in good external condition (Record, p. 146). As consideration for joining in the scheme to deceive, the ship was given prepaid freight and secret letters of indemnity against the expected claims of the deceived consignees. These letters were not attached to the bills of lading nor was any mention made of them on the face of the bills. The corrupt purpose of the ship is also evidenced by the fact that, although she could easily have protected herself by insisting on the issuance of bills of lading naming the shippers or their agents as consignees, she chose to issue bills naming innocent consignees to whom her agent and her captain knew the bills of lading would be sold in due course. The ship thus, with full opportunity to know the apparent bad condition of the goods forming the subject of the contract, contracted directly with third persons who she knew would in ordinary course of business buy the bills of lading without knowledge of the bad condition. It is on these undisputed facts that we contend

that the ship must be held to have misrepresented to the consignees the apparent external condition of the goods, or at least to be estopped from excusing breakage of the casks taking place while in her possession on the ground that they were in apparent bad external condition. The question as stated by counsel for the ship would arise only in a case where such a bill of lading as was issued by the *Isla de Panay* is not regarded by trade usage as a "clean" bill of lading and where the carrier was not guilty of issuing such a bill of lading for the purpose of deceiving an innocent purchaser.

Captain Muslera of the *Isla de Panay,* in answer to the question, "Captain, why are these letters of guarantee given in Seville," said:

> "If the bills of lading are issued with a note on them the insurance companies or the bankers in Spain will not accept that bill of lading on account of the condition in which the goods are, but if they have no clause on it *THEY WILL PASS IT TO A BANKING HOUSE AND THE INSURANCE COMPANY THAT THEY HAVE BEEN SHIPPED BY THE SHIPPER IN APPARENT GOOD ORDER AND CONDITION,* although they have issued a letter of guarantee relieving the company of any responsibility whatsoever for the condition of the packages" (Rec., p. 146). (Capitalization ours.)

This testimony of the captain is quoted in the

opinion of the Circuit Court of Appeals, at page 233 of the record.

The District Court also, in its opinion, said:

> "Libellants are consignees of shipments of olives under clean bills of lading: * * * I think the great weight of evidence is to the effect that the chestnut casks containing the olives were old and insufficient at the time the merchandise left Seville for transshipment to claimant's vessel at Cadiz. The steamship agents distrusted the containers and insisted upon an agreement of indemnity as a condition of carrying the merchandise under clean bills of lading, which seems to have been given at Seville. * * * The libellants paid drafts accompanying the bills of lading without knowledge that the containers were old and insufficient. If there is any liability here for damages, it is upon the theory that by failing to note in the bills of lading any insufficiency in the containers, the steamship misled the libellants to their injury and is now estopped, under the doctrine of *Higgins* v. *Anglo-Algerian Steamship Company*, 248 Fed. 386, to claim that the containers were insufficient. In that case, however, there was in the bill of lading the express representation that the merchandise itself was in apparent good order and condition. * * * No case has gone so far as to hold that a bill of lading containing no words representing the condition of the

> containers would give rise to an estoppel" (Record, pp. 222 and 223).

The Circuit Court of Appeals affirmed this decision (Record, p. 231), and added as the last paragraph in its opinion (Record, p. 242): "In the *Higgins* case [248 Fed. 386] the bills of lading recited that the shipments had been received in good condition. In the instant cases the bills of lading contain no representation as to their condition one way or the other, and the distinction is vital." The Court made no attempt to reconcile this conclusion with the uncontradicted evidence quoted in its opinion that a "clean" bill of lading "indicates that the merchandise was in good condition when it was received from [by] the steamship company" (Opinion, C. C. A., Record, p. 238), and that "the bills of lading which were issued in these cases were what are known as 'clean' bills" (Opinion, C. C. A., Record, p. 238).

It is well settled by decisions of this Court that a concealment of a material fact by a person under a duty to disclose it to another, resulting in prejudice to such person, is sufficient to constitute an estoppel. In *Morgan* v. *Railroad Company*, 96 U. S. 716, 720, this Court said:

> "The appellee insists that the record discloses a case of estoppel *in pais*, and that the appellant is thereby barred from maintaining the claim which he seeks to enforce in this litigation. The principle is an im-

portant one in the administration of the law. It not infrequently gives triumph to right and justice where nothing else could save them from defeat. It proceeds upon the ground that he who has been silent as to his alleged rights when he ought in good faith to have spoken, shall not be heard to speak when he ought to be silent. *The Bank of the United States* v. *Lee*, 13 Pet. 107.

He is not permitted to deny a state of things which by his culpable silence or misrepresentation he had led another to believe existed, and who has acted accordingly upon that belief. The doctrine always presupposes error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage. *Merchants' Bank* v. *State Bank*, 10 Wall. 604."

In *Leather Manufacturers' Bank* v. *Morgan*, 117 U. S. 96, 108-109, this Court said:

"The doctrine of estoppel by conduct has been applied under a great diversity of circumstances. In consideration of the question before us aid will be derived from an examination of some of the cases in which it has been defined and applied. In *Morgan* v. *Railroad Co.*, 96 U. S. 716, 720, it was held that a party may not deny a state of things which by his culpable silence or misrepresentations he has led another to believe existed, if the latter has acted upon

that belief. 'The doctrine,' the court said, 'always presupposes error on one side and fault or fraud upon the other, and some defect of which it would be inequitable for the party against whom the doctrine is asserted to take advantage.' In *Continental Bank* v. *Bank of the Commonwealth*, 50 N. Y. 575, 583, it was held not to be always necessary to such an estoppel that there should be an intention, upon the part of the person making a declaration or doing an act, to mislead the one who is induced to rely upon it. 'Indeed,' said Folger, *J.*, 'it would limit the rule much within the reason of it if it were restricted to cases where there was an element of fraudulent purpose. In very many of the cases in which the rule has been applied, there was no more than negligence on the part of him who was estopped, but it has long been held that where it is a breach of good faith to allow the truth to be shown, there an admission will estop. *Gaylord* v. *Van Loan*, 15 Wend. 308.' The general doctrine, with proper limitations, was well expressed in *Freeman* v. *Cooke*, 2 Exch. 654, 663, and in *Carr* v. *London & Northwestern Railway Co.*, L. R., 10 C. P. 307. In the first of those cases it was said by Parke, *B.*, for the whole court, that 'if, whatever a man's real intention may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making

the representation would be equally precluded from contesting its truth; and conduct, by negligence or omission, when there is a duty cast upon a person by usage of trade or otherwise to disclose the truth, may often have the same effect.' And in the other case, Brett, *J.*, speaking for the court, said: 'IF IN THE TRANSACTION ITSELF WHICH IS IN DISPUTE, ONE HAS LED ANOTHER INTO THE BELIEF OF A CERTAIN STATE OF FACTS BY CONDUCT OF CULPABLE NEGLIGENCE CALCULATED TO HAVE THAT RESULT, AND SUCH CULPABLE NEGLIGENCE HAS BEEN THE PROXIMATE CAUSE OF LEADING AND HAS LED THE OTHER TO ACT BY MISTAKE UPON SUCH BELIEF, TO HIS PREJUDICE, THE SECOND CANNOT BE HEARD AFTERWARDS, AS AGAINST THE FIRST, TO SHOW THAT THE STATE OF FACTS REFERRED TO DID NOT EXIST.' See also *Manufacturers' & Traders' Bank* v. *Hazard*, 30 N. Y. 226, 229; *Blair* v. *Wait*, 69 N. Y. 113, 116; *McKenzie* v. *British Linen Co.*, 6 App. Cas., 82, 101; *Miles* v. *McIlwraith*, 8 App. Cas. 120, 133; *Cornish* v. *Abington*, 4 H. & N. 549, 556.

Upon this doctrine, substantially, rests the decision in *Bank of United States* v. *Bank of Georgia*, 10 Wheat. 333, 343." (Capitalization our own.)

In *Dickerson* v. *Colgrove*, 100 U. S. 578, 580, this Court said:

"The estoppel here relied upon is known as an equitable estoppel, or estoppel *in pais*. The law upon the subject is well settled.

> The vital principle is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted. Such a change of position is sternly forbidden. It involves fraud and falsehood, and the law abhors both. This remedy is always so applied as to promote the ends of justice."

In *The United States Bank* v. *Lee,* 13 Peters (38 U. S.), 107, the syllabus in part says:

> "He who holds his peace when he ought to have spoken, shall not be heard now that he should be silent; he is deemed, in equity, a party to the fraud."

In *Stewart* v. *Wyoming Ranch Co.,* 128 U. S. 383, 388, this Court said:

> "In an action of deceit, it is true that silence as to a material fact is not necessarily, as a matter of law, equivalent to a false representation. But mere silence is quite different from concealment; *aliud est tacere, aliud celare;* a suppression of the truth may amount to a suggestion of falsehood; and if, with intent to deceive, either party to a contract of sale conceals or suppresses a material fact, which he is in good faith bound to disclose, this is evidence of and equivalent to a false representation, because the concealment or suppression is in effect a representation that

> what is disclosed is the whole truth. The gist of the action is fraudulently producing a false impression upon the mind of the other party; and if this result is accomplished, it is unimportant whether the means of accomplishing it are words or acts of the defendant, or his concealment or suppression of material facts not equally within the knowledge or reach of the plaintiff."

The "obligation to speak" has long been recognized by the courts and is of ancient origin. In *Turner* v. *Green* (1895), 2 Ch. 205, 208, the Court said:

> "The distinction between suppression of a fact and mere silence is a very old one, and is to be found in a passage from Cicero (De Off, lib. iii. c. 13), which is cited by Sir Edward Fry in his book (3rd. Ed. p. 329) *'Aliud est celave, aliud tacere; neque enim id est celare quicquid reticeas.'*"

In the present case there was not merely negligence or silence of the *Isla de Panay's* agent, but deliberate and intentional concealment. Her agent did not merely stand by when the bills of lading were issued, but conspired with the shippers to defraud purchasers of the goods shipped. He declined to issue clean bills of lading until the shippers would indemnify him against what he knew would be a result of his fraudulent act. The clean bills of lading were signed by such agent because he would "not accept responsibility for

the damages that they [the goods] suffer as natural consequences of the voyage" (Record, p. 221).

The decisions of the Courts below are also contrary to the decisions of Circuit Courts of Appeal of other circuits.

In *H. Scherer & Co.* v. *Everest,* 168 Federal 822, 829, the Circuit Court of Appeals for the Eighth Circuit said:

> "If so, the purchaser of the notes who took them up in good faith in reliance upon their apparent validity and upon the Decatur Company's apparent ownership of them must suffer for this fraud, while the Transfer Company which made the notes, which knew they were without consideration, which created their false appearance of validity and the false appearance of their ownership by the Decatur Company, escapes the evil consequences of its participation in the fraud. This would be a reversal of the familiar and salutary rule that one who by his acts or representations, or by his silence when he ought to speak out, intentionally or through culpable negligence induces another to believe certain facts to exist, and the latter rightfully acts on such a belief, so that he will be prejudiced if the former is permitted to deny the existence of such facts, is thereby conclusively estopped to interpose such denial. *Paxson* v. *Brown,* 61 Fed. 874, 882, 10 C. C. A. 135, 143; *Union Pacific Ry Co.* v. *United States,* 67 Fed. 975, 979, 15 C. C. A. 123,

127; *Illinois Trust & Savings Bank* v. *City of Arkansas City*, 76 Fed. 271, 293, 22 C. C. A. 171, 192, 34 L. R. A. 518; *Given* v. *Times Republican Printing Co.*, 114 Fed. 92, 95, 52 C. C. A. 40, 43; *Mechem on Agency*, Sections 83, 84."

In *The Tampico*, 270 Federal 537, 540, 541, the Circuit Court of Appeals for the Ninth Circuit said:

> "These communications from the appellee answered the appellant's inquiry as to the term of the original charter party. The appellant had asked for a copy of that charter, for the purpose of ascertaning the length of time for which the owner had parted with the right of possession. The letters conveyed that information fully and completely. The appellant had the right to rely on the information so furnished. It had the right to believe that there was no provision in that charter party by which the term thereof could be abbreviated at the option of the owner. The representation was made with the intention that it should be acted upon. It was a representation such as to induce a reasonable and prudent man to believe that it was intended to be acted upon, and the appellant in acting upon it exercised such reasonable diligence as the circumstances required. The situation is the same as it would have been, had the appellee sent the appellant a copy of that charter party, with the optional pro-

vision in favor of the owner inadvertently omitted therefrom." * * *

"It is contended that there can be no estoppel in cases where, as here, the representations were made without fraudulent intent. But the rule is well established that it is not necessary that the representations shall have been made with such an intent. It is sufficient if they are 'of such a character as to induce a reasonable and prudent man to believe that they were intended to be acted on.' 21 C. J. 1121; 10 R. C. L. 691."

There, as in this case, there was a mere concealment without express representation.

The elements of an estoppel *in pais* are stated by Pitney, *J.*, in *Central Railroad Company* v. *MacCartney,* 68 N. J. L. (39 Vroom), 165, 175, 176, as follows:

"1. That the party against whom the estoppel is urged has, on a previous occasion, by words or conduct, made a representation or concealment of material facts inconsistent with the facts forming the basis of his present claim.

2. That such party either knew the facts to be otherwise than represented, or except for gross negligence would have known; or that he pretended to know the facts when he knew that he did not know them.

3. That such representation or concealment was made with the intent to influence

the conduct of another or else was made under such circumstances that a reasonably prudent man would suppose it was intended to be acted upon as true.

4. That the party to whom it was made was ignorant of the facts and had no convenient opportunity to ascertain them.

5. That the latter party in good faith, relied upon the representations or conduct of the other party and thereby was led into such a course of conduct that he will now be substantially prejudiced if the other party be permitted to repudiate his former action or representation."

In the present case:

(1) The *Isla de Panay's* agent admittedly concealed the material fact that at the time he issued the bills of lading the goods were unfit for carriage;

(2) He actually knew that the goods were unfit for carriage, and to protect himself obtained a written guarantee of indemnity from the shippers, without noting on the bill of lading that this guarantee had been executed, and knowing that notice of the guarantee would not be given to the consignee;

(3) Such concealment was made with the intent to influence the consignee to pay the sound value of the goods represented by the bill of lading before having an opportunity to examine the goods;

(4) The consignee was ignorant of the actual condition of the goods, and had no opportunity to examine them, they being in the possession of the *Isla de Panay's* agents on the high seas; and

(5) The consignee in good faith relied upon the conduct of the *Isla de Panay's* agent in accordance with the undisputed trade usage that such bills of lading were clean, and thereby was led into paying cash for the bills of lading on the assumption that they represented sound goods.

These authorities establish that the issuance of a clean bill of lading will estop the shipowner from relying upon bad condition known by him at the time of shipment. He cannot, as the shipowner attempts to do in this case, set up as an excuse for failing to deliver the cargo in good order and condition that the packages were frail when he knew that fact at the time the goods were offered for shipment, and when from his own admission he would not have accepted the goods for shipment but for a secret agreement between himself and the shippers.

As we have shown above, the principle of estoppel is just as effective where one fails to speak, who should have spoken, as it is when an express misrepresentation is made. The gist of the estoppel is that the person who is estopped knew that the person injured would act upon his good faith. And, in this case, where the shipowner (the claimant and owner of the *Isla de Panay*, the actual party to this suit who filed the claim

to the ship) knew that the form of bill of lading which it issued was usually accepted and would be accepted in this case as a clean bill of lading, *i. e.*, a bill of lading acknowledging receipt of the goods in apparent good order and condition, it is, in fact, in identically the same position as if it had used the words "apparent good order and condition" in the bills of lading.

Thus all the elements of an estoppel exist without dispute in this case. Indeed, it is so elementary that a deliberate concealment of a material fact by one under a duty to disclose it is the equivalent of an express representation in constituting an estoppel, that we need only ask this Court to read the facts as stated in the opinions of the two Courts below, and then read the definition of the elements of an estoppel contained in 21 Corpus Juris 1249.

In Williston on Contracts, Volume III, Section 1426, page 2545, it is said:

> "Not only will innocent misrepresentation of a material fact preclude recovery, a doctrine that has now been generally adopted from courts of equity by courts of law, as a ground for rescission, but failure to communicate material facts of which fair dealing demanded the disclosure, will preclude specific performance both of contracts between vendor and purchaser, and contracts of other kinds."

And in Williston on Contracts, Volume III, Section 1497, page 2664, it is said:

> "It has been held with obvious justice that mistake by one party and knowledge of the mistake by the other, will justify relief as fully as mutual mistake."

And in Williston on Contracts, Volume III, Section 1498, page 2665, it is said:

> "There are exceptions to the general rule that silence cannot amount to fraud. While it is nowhere held that collateral circumstances tending to enhance the value of the subject of the sale must be disclosed in the absence of some special relation between the parties, it is held in many States that if the subject-matter of the sale is materially defective to the knowledge of the seller, and the defect is latent, an action of deceit or other remedy based on fraud will lie in favor of a buyer who purchases the goods on the assumption that they are what they seem. * * * It is certainly true that any active conduct or words which tend to produce an erroneous impression may amount to fraud, and HALF THE TRUTH MAY BE A LIE IN EFFECT." (Capitalization ours.)

And in Williston on Contracts, Volume III, Section 1499, page 2666, it is said:

> "Active concealment of the facts, also, would be held fraudulent by some courts which would not hold mere silence suffi-

cient, though it may seem difficult to make out an actual misrepresentation from acts of concealment unknown to the other party. In some contracts, such as insurance and, to a less extent, guaranty failure to disclose material facts is already recognized by the law as fraudulent, and the tendency in the law of sales, as well as in other contracts, is doubtless toward requiring a somewhat higher degree of good faith than formerly, especially where the opportunities for information are not equally open to both parties. In case a fiduciary relation exists between the parties, as that of trustee and *cestui que trust,* guardian and ward, lawyer and client, there is a positive duty, a failure to observe which is constructively fraudulent; and the nature of the transaction or the relation of the parties may be such that as to the particular transaction in question, the duties of a fiduciary are imposed upon one or the other party, and such a relation involves a duty of disclosure."

In *Higgins* v. *Anglo-Algerian S. S. Co.,* 248 Fed. 386, the Circuit Court of Appeals for the Second Circuit, composed of different judges from those who decided the present case, held that a carrier who, knowing that goods are in apparent bad condition, accepts them on letters of guarantee being given and issues bills of lading acknowledging receipt in good condition, is estopped from setting up the fact that the goods were in apparent bad condition when received by it. In the

course to its opinion, the Court said (248 Fed. 386, 387):

> "Further the respondent had the courage to set up as a defense its own complicity in a fraud, viz., that a large number of the cases which had been wet and were stained and discolored by rain were received from lighters; that their stained, damaged, and discolored condition had been noted on the mate's receipts, but that a clean bill of lading was delivered to the shippers at their request, against their agreement to indemnify the respondent against loss for so doing. This was pleaded as an admission binding on the holder of the bill of lading that the cases were not shipped in apparent good order and condition, and a bar to the maintenance of the libel. • • •
>
> Though courts of admiralty are not courts of equity, and may not be able to give affirmative relief in the case of contracts induced by preliminary fraudulent representations (*Williams* v. *Insurance Co., D. C.*, 56 Fed. 159), still they do proceed upon equitable principles and may prevent a party from taking advantage of his own fraud in the contract itself. *Pew* v. *Laughlin* (D. C.) 3 Fed. 39; *The Hero* (D. C.) 6 Fed. 526, and *The Electron* (D. C.) 48 Fed. 689, are examples. To give the carrier the benefit of this exception would be to enable it to protect itself against the consequences of its own fraud."

There are numerous decisions of the Admiralty Courts supporting this same principle.

In *Bradstreet* v. *Heran,* 3 Fed. Cases, page 1183, No. 1792a, Mr. Justice Nelson, sitting on Circuit, held that, where cotton was shipped in obviously bad shipping condition, some of the bales being rotten or burst open, others with the bagging torn and still others with the bagging old and rotten or damaged by wet, the master was negligent and inattentive in accepting the bales as "in good order and well conditioned" and was liable to the consignee, who had made large advances upon the bales on the faith of the representation in the bill of lading that it had been shipped in good order.

In *Martineaus* v. *Royal Mail Steam Packet Co.,* 12 Asp. M. C. 190; 17 Com. Cas. 176, 179-180, Mr. Justice Scrutton said:

> "I think the explanation of the captain's conduct is to be found in his owners' letter of November 10, 1911, 'If all these notations were to appear in bills of lading there would be, as there has been in the past, a great outcry about the unnecessary clausing of bills of lading.' And I suspect that some instructions to this effect, possibly misunderstood by the captain in this case, have not been modified since the decision of Channell, *J.,* drew attention to the importance of an accurate statement of condition on shipment. If the mate's and master's view was the one they took at the time, it yet resulted in a misstatement of

fact, for the bags were not in apparent good order and condition. And in my view, if masters make such statements of fact, they must not guess at the nature of the contents and their effects, but must ask before drawing inferences from the assumed nature of the contents and making statements of fact based thereon" (pp. 179, 180).

See also *Crawford & Law* v. *Allan Line S. S. Co., Ltd.* (1912), A. C. 130; *National Bank* v. *Kershaw Oil Mill,* 202 Fed. 90, 97 (C. C. A. 4).

In *Nelson* v. *Woodruff,* 1 Black (66 U. S.) 156, 168, 169, this Court said:

"The result of our examination of these cases is, that *though the owners of The Maid of Orleans could not controvert the affirmance in these bills of lading, that the lard of the shippers had been received on board of their ship in good order and condition,* that they have made out, by sufficient and satisfactory proofs, that the leakage and diminution of the lard was owing to *existing but not apparent causes,* in the condition of the lard, acting upon the barrels in which it was, which are not within the risks guaranteed against to the shippers by the bill of lading. In conclusion, that the signing of a bill of lading, acknowledging that merchandise had been received in good order and condition, is *prima facie* evidence that, as to all circumstances which were open to inspection and visible, the

goods were in good order; but it does not preclude the carrier from showing that the loss proceeded from some cause which existed, *but was not apparent when he received the goods* and which, if shown satisfactorily, will discharge the carrier from liability." (Italics ours.)

If the *Isla de Panay's* agent were entirely innocent of misrepresentation or fraud, the *Isla de Panay* should, nevertheless, be held liable under the rule that, where one of two innocent parties must suffer, he must bear the loss whose act put it in the power of the third party to commit the wrong.

It is uncontroverted that the issuance of the bills of lading by the *Isla de Panay's* agent in the form in which they were issued was a necessary step in putting it in the power of the shippers to defraud the consignees.

In *Peoples Bank* v. *The National Bank,* 101 U. S. 181, 183, this Court said:

> "Where one of two innocent parties must suffer by the wrongful act of a third, he who gave the power to do the wrong must bear the burden of the consequence."

See also *Butler* v. *United States,* 21 Wallace 272; *Pompton* v. *Cooper Union,* 101 U. S. 196.

This is an ancient doctrine. It is announced in *Hern* v. *Nichols,* 1 Salkeld 289:

> "For, seeing somebody must be a loser by

> this deceit, it is more reason that he that employs and puts a trust and confidence in the deceiver should be a loser than a stranger."

The rule is stated with pertinence by Lord Romilly in *Briggs* v. *Jones, Law Reports,* 10 Eq. 92, 98:

> "A person who puts it in the power of another to deceive and to raise money must take the consequences. He cannot afterward rely on a particular or different equity."

See also *Sheffield Corp.* v. *Barclay,* L. R. 1905 App. Cas. 392, 397, and *Dugvale* v. *Lovering,* L. R. 10 C. P. 196, 199.

In *Smith* v. *Armour Packing Company,* 158 Fed. 86, 88, the Circuit Court of Appeals for the Eighth Circuit, said:

> "The case presents an apt instance for the application of the wholesome rule that, where one of two innocent parties must suffer, he must bear the loss whose act put it in the power of the third party to commit the wrong."

In *H. Scherer & Co.* v. *Everest,* 168 Fed. 822, the Circuit Court of Appeals for the Eighth Circuit, said:

> "The Transfer Company intentionally and with culpable negligence made and intrusted these deceitful representations and the power to use them to its agent, the

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Decatur Company, and if the latter abused that power the Transfer Company and its successor in interest, the trustee, are estopped from denying that its representations were true for the purpose of defeating the claims of the holders of these notes. When one of two parties must suffer loss from the fault of a third, he who wrongfully or with culpable negligence put it in the power of the third to cause the loss must bear it."

The carrier was under a duty to disclose to the consignees the fact that the casks were apparently in bad external condition and unfit for carriage.

A positive duty to disclose arose in this case from the fact that although the ship's agent could have insisted that the casks be first sufficiently reconditioned (by substituting new heads and hoops) or that the true condition of the goods be noted on the bills of lading he elected to accept the casks while in "very bad condition" and to name and thereby contract with [*Rodocanachi* v. *Milburn* (1886), 18 Q. B. D. 67; *Hinrichs* v. *Bank*, 279 Fed. 382, 386], innocent consignees whom he knew would pay for the bills of lading as representing sound goods before having an opportunity to examine them.

The *Isla de Panay* being a general cargo ship had the same right as any other common carrier, to refuse to accept for carriage goods packed in defective containers. *Hannibal R. R. Co.* v. *Swift*,

79 U. S. 262; *The David & Caroline,* 5 Blatchford 266. Her master had a right to require that such goods be first reconditioned or new casks substituted. A failure to require reconditioning in a necessary case is negligence or malfeasance creating a duty to disclose even if no bill of lading is issued, provided the consignee is other than the shipper.

In *Hannibal Railroad* v. *Swift,* 79 U. S. 262, at p. 272, this Court said: "If objection existed on any of these grounds ["to the manner in which the property was packed"] or any other ground not concealed but open to the observation of the company, *it should have been stated before the property was received.*" (Italics ours.)

And at page 273 (79 U. S.) this Court said:

> "The common carrier is regarded as an insurer of the property carried, and upon him the duty rests to see that the packing and conveyance are such as to secure their safety."

Under such circumstances, therefore, an implication arises that the goods covered by the bill of lading are normally fit to withstand ordinary handling during the carriage and discharge, unless the shipmaster makes notations to the contrary. This implication also arises as a corollary of the principle recognized as to all kinds of contracts that it is the duty of a contracting party

who has exclusive knowledge of material facts, to disclose those facts to the other party. *Strong* v. *Repide,* 213 U. S. 419; 18 Am. & Eng. Encyc. of Law, Second Edition, p. 224; *Molyneux* v. *Hawtrey,* L. R. (1903) 2 K. B. 487; *Carlish* v. *Salt,* L. R. 1906, 1 Ch. 335; *Phillips* v. *Homfray,* L. R. 6 Ch. 770; Williston on Sales (2d Ed.), Secs. 234 and 265; *Cesar* v. *Karutz,* 60 N. Y. 229.

In *Harp* v. *Choctaw O. & G. R. Co.,* 125 Fed. 445, 449-450, the Circuit Court of Appeals for the Eighth Circuit, composed of Circuit Judges Sanborn, Thayer and Van Devanter, said:

> "A common carrier, however, is not bound by the rules of the common law to receive and carry commodities of any and every kind which may be offered to it, but only such as it makes a practice of transporting. * * * Moreover, it is entitled in the first instance by the common law, to establish reasonable rules and regulations governing the manner and form in which it will receive such articles as it professes to carry, and *providing how they shall be packed* for shipment so that they may be handled and transported conveniently, *safely,* and expeditously. Hutchinson on Carriers, sections 111 and 113, and cases there cited." (Italics ours.)

The liability of a common carrier of goods does not primarily, at least, rest on the contract to carry, but is implied by law, having its foundation in the policy of the law, and it is by reason

of this legal obligation that a carrier is charged with the loss of, or injury to, property intrusted to it for carriage. *Railroad Co.* v. *Swift,* 12 Wall. 262; *The Georg Dumois,* 88 Fed. 537, 540.

In *Klauber* v. *American Express Co.,* 21 Wis. 21, 24, 91 Am. Dec. 452, the Court said:

> "The improper packing which will excuse the carrier signifies some internal or latent defect of which the carrier does not know, and from which loss or damage ensues to the goods in the ordinary course of handling or transportation."

In *Atlantic Coast Line R. Co.* v. *Rice,* 169 Ala. 265, 273, 52 So. 918, the Court said:

> "The carrier may, in a proper case, refuse a shipment where in unfit condition for transportation. If so, it must be a necessary consequence that, having accepted the shipment as tendered, its duty is unmodified by the character, sufficiency or insufficiency, open to observation, of the packing of the shipment so received for transportation."

See also:

Union Express Co. v. *Graham,* 26 Ohio St. 595;

Calender v. *Chicago R. Co.,* 99 Minn. 295, 109 N. W. 402;

Northwestern Co. v. *Williams,* 128 Minn. 514, 151 N. W. 419;

The David and Caroline, 7 Fed. Cases No. 3,593;
McCarthy v. *Louisville R. Co.,* 102 Ala. 193, 14 So. 370; and
Kinnick v. *Chicago R. Co.,* 69 Iowa 665, 29 N. W. 772.

In *The Delaware,* 14th Wall. 579, the bill of lading was silent as to whether goods were to be carried on deck or under deck. During the course of the opinion the Court said (at p. 602) "it is settled law in this Court that a *clean bill of lading* imports that the goods are to be safely and properly stowed under deck." The facts in the present case show also that a clean bill of lading imports shipment "in apparent good order and condition" (Opinion Circuit Court of Appeals, Record, p. 33).

A duty to disclose also arose from the trade usage which was testified to by the respondent's witnesses. This usage required that if casks were offered for shipment in apparent bad external condition, the bills of lading should contain notations showing that fact (Opinion, C. C. A., Record, pp. 238, 239; Opinion, D. C., Record, p. 222; Record, pp. 167, 166, 174, 212, 144, 145, 146, 97). The consignees were entitled to rely on this usage.

A duty to disclose also arose from the issuance by the *Isla de Panay* of commercial documents intended for sale to innocent buyers. Admiralty Courts have always held the issuers of bills of

lading to a high standard of fairness. This tends to encourage commerce. If there is no duty of the issuer of a bill of lading intended for sale to an innocent consignee to disclose, at least in a general way, facts obviously impairing the value of the bill of lading, ship's agents will be encouraged to issue confused and ambiguous bills of lading and to tamper with the centuries-old recitals which have made bills of lading a trustworthy and marketable symbol of the goods described and thus permitted the expansion and development of international commerce. *Pollard* v. *Reardon*, 65 Fed. 848 (C. C. A. 1); *Watts* v. *Cargo of Lumber*, 161 Fed. 104 (C. C. A. 2).

The Harter Act.

A duty to disclose also arose from Section 4 of the Harter Act of February 13th, 1893 (7 U. S. Compiled Statutes, pp. 85-87). The Act is quoted in full at page 84 of this brief. Section 4 of the Act is as follows:

> "It shall be the duty of the owner or owners, master or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports, to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating among other things, the marks necessary for identification, number of packages or quantity, stating whether it be carrier's or shipper's weight, *AND APPARENT ORDER OR CONDI-*

> ***TION OF SUCH MERCHANDISE OR PROPERTY*** delivered to and received by the owner, master or agent of the vessel for transportation, and such document shall be *prima facie* evidence of receipt of the merchandise therein described." (Capitalization ours.)

The Circuit Court of Appeals held (Record, pp. 240, 241) that the only effect of the violation of this section of the Harter Act by the *Isla de Panay* was the possibility of a fine under Section 5 of the Act. We respectfully submit that the Court erred in so saying. As we view it, Section 4 of the Act created the duty on the part of the shipowner and the master to disclose the apparent condition of the goods for the benefit of innocent purchasers of the goods. In *Knott* v. *Botany Mills*, 179 U. S. 69, this Court construed Section 1 of the Act. That section declares that any provision in a bill of lading, whereby the obligation of the shipowner to use due care in the loading, stowage, custody and care of the cargo is lessened or diminished, shall be void and of no effect. It also provides that the section shall apply to all ships transporting merchandise "from or between ports of the United States and foreign ports." It was argued in this Court that the section did not apply to ships loading abroad. It was urged upon the Court that, to so hold, would involve making vessels in foreign ports subject to the penalty pre-

vided for in Section 5 of the Act. In disposing of this contention, this Court said (at p. 76):

> "Attention was also called to the fourth section of the act, which makes it the duty of the owner, master or agent of 'any vessel transporting merchandise or property from or between ports of the United States' to issue to shippers bills of lading containing a certain description of the goods; and to the fifth section, which provides that, 'for a violation of any of the provisions of this act, the agent, owner or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars,' and the amount of the fine and costs shall be a lien upon the vessel, and she may be libelled therefor in any District Court of the United States within whose jurisdiction she may be found. It was argued that this provision imposing a penalty would cover a refusal to give a bill of lading without the clauses prohibited by the first section; and could not extend to acts done in a foreign port out of the jurisdiction of the United States. But whether that be so or not, (which we are not required in this case to decide,) it affords no sufficient reason for refusing to give full effect, according to what appears to us to be their manifest meaning, to the positive words of the first section, which enact, as to 'any vessel' transporting merchandise or property 'between ports of the United

States and foreign ports,' that all stipulations relieving the carrier from liability for loss or damage arising from negligence in the loading or stowage of the cargo shall not only be unlawful, but shall be null and void and of no effect.'"

It is to be observed that the language of Section 4 is identical with that of Section 1 in respect of the vessels or persons to whom it applies. It is significant that Sections 1 and 4 are the only two sections of the Act which are self-executing. Section 1 declares that any words inserted in a bill of lading for the purpose of imposing contractual obligations which are forbidden by the section, shall be null and void. Section 4, after providing that "it shall be the duty of the owner * * * master, etc.," to issue bills of lading describing the merchandise and stating the apparent order or condition of such merchandise declares that such a document shall be *prima facie* proof of the receipt of the merchandise therein described. It is significant also that, by Section 7 of the Act, Congress treats Section 1 and Section 4 as if they were in a different category from the other sections of the Act. Therefore, it would seem that the conclusions reached by this Court in *Knott* v. *Botany Mills* would apply to any case arising under Section 4.

This Court in *The Delaware*, 161 U. S. 459, 470 *et seq.*, gives the history of the Harter Act. At page 471, it said: "The *fourth* section makes it

obligatory to issue to shippers a bill of lading, stating certain particulars [including apparent condition of the goods], which document shall be *prima facie* evidence of the receipt of the merchandise therein described."

In so far as estoppel is concerned, of what materiality is the provision for a penalty? Congress imposed the obligation on the carrier to speak, and when the ship or her owner failed to do so, why should they be permitted to shield themselves from the legal consequences of such failure by saying that the cargo owner's sole remedy is to permit the Government to claim a penalty?

The natural interpretation of Section 4 would seem to require it to be treated as this Court treated Section 1 in *Knott* v. *Botany Mills*, viz.: to give effect to it in such a case as the present, irrespective of the penalty provisions. This was done by the Circuit Court of Appeals for the First Circuit in *Hansen* v. *American Trading Co.*, 208 Fed. 884. Such a result is not only supported by the decision in *Knott* v. *Botany Mills* but, as the facts of this case show, is necessary if any effect is to be given to the Act in order to protect our importers when foreign shippers and shipowners conspire to defraud American importers. It can hardly be supposed that under the circumstances which existed in this case a demand would be made on the shipowner or master for a bill of lading stating the apparent condition of the goods. The shipper wished to keep the importers in ignorance of the fact that the goods were in apparent bad condition. The shipowner in consider-

ation of the letters of guarantee, aided and abetted the shipper in his purpose to keep the consignees ignorant of that fact. In such a case it is impossible to conceive of the shipper laying the necessary foundation for the penalty by making the demand which Section 5 makes a condition precedent to the claim for a penalty. To say, as the Circuit Court of Appeals says, that the only effect of a violation of Section 4 is to give the right to claim the penalty makes the Act useless in so far as it relates to vessels coming from foreign ports. This obviously was not the intent of Congress. It can hardly be thought that Congress intended the section to apply to vessels loading in foreign ports for the United States and at the same time to make it inoperative in so far as shipments from foreign ports are concerned.

Congress clearly intended Section 4 to benefit the cargo owner. See *The Delaware, supra* (161 U. S.) at p. 474. This section does not abrogate the maritime or common law rules for measuring the actual damages of a cargo owner resulting from a breach of contract. It leaves these rules in full force. Section 5 provides a penalty for any breach recoverable by the Government. But Congress did not provide that the penalty should be a substitute for or impair in any way a cargo owner's measure of actual damages in a contract or tort action against the ship not involving the Government. It did not provide that the penalty should be recoverable as damages in a suit by the cargo owner. A breach of the statutory duty by

the ship, therefore, made the ship liable not only to a penalty to the Government but to the ordinary legal consequences of a breach of such a contract as the Act provided a carrier must make. This Court has always given effect to the plain intent of Congress provided the statute is not unconstitutional. Can it be seriously contended that Congress intended in all cases, no matter how great the actual damages resulting to cargo owners from the breach, that the ship should only be liable to pay a maximum of $2,000 to the Government? It is elementary that a person suffering damages from the breach by another person of a statutory duty created for his benefit may recover his actual damages in a civil suit notwithstanding the Government for the same breach may also recover a fine or penalty. 1 Corpus Juris, 957. The fine or penalty is not conditioned on and has no relation to the actual damages suffered by a private person.

THE COURT BELOW INCORRECTLY DECIDED AS MATTER OF LAW THAT "THE BURDEN OF PROOF RESTED UPON THE LIBELLANTS TO ESTABLISH NEGLIGENCE ON THE PART OF THE CLAIMANT, AND THIS BURDEN WE HAVE NO HESITATION IN SAYING WAS NOT SUSTAINED" (Record, p. 237).

This might perhaps be so if the present suits were by the original shippers. But the suits are by innocent consignees from whom the ship con-

cealed the fact of bad external condition of the casks, and with whom it contracted by naming them as consignees with knowledge (Record, p. 146) that the bills of lading would be sold to them in due course before the casks would arrive at destination. As said in *Higgins* v. *Anglo-Algerian S. S. Co.*, 248 Fed. 386, 388:

> "It is to be noted that in all the foregoing cases the statement, though untrue, was the result of negligence, or misunderstanding, or mistake; whereas, there can be no other explanation of the carrier's conduct in this case than that it was willing to assist the shipper in misleading subsequent holders of the bill of lading, provided he agreed to hold it harmless for so doing. Although a bill of lading is only a quasi negotiable instrument, we are not impressed by the argument that, because the carrier could have set up this defense against a shipper, it can set it up against the subsequent holder of the bill of lading, who was intended to be misled, because he is the assignee of the shipper."

Judge Learned Hand, in his opinion in the District Court, in *Higgins* v. *Anglo-Algerian Steamship Company*, 242 Fed. 568, 571, said:

> "the excuse that a bill of lading is not negotiable has no authority whatever, nor have any of the authorities cited any bearing on the case where a false statement is deliberately inserted to be acted upon by innocent third persons. To allow the ship

to escape liability under such circumstances would be intolerable."

In *Bank of Batavia* v. *N. Y. L. E. & W. R. R. Co.*, 106 N. Y. 200, 201, the Court of Appeals of New York said:

> "While bills of lading are not negotiable in the sense applicable to commercial paper, they are very commonly transferred as security for loans and discounts, and carry with them the ownership, either general or special, of the property which they describe. It is the natural and necessary expectation of the carrier issuing them that they will pass freely from one to another and advances be made upon their faith, and the carrier has no right to believe, and never does believe, that their office and effect is limited to the person to whom they are first and directly issued."

It is an elementary rule of evidence that the burden of bringing forward evidence is on the contracting party who had the exclusive opportunity to examine the goods forming the subject of the contract to show that his failure to perform a promise made with full knowledge of their condition is not due to an apparent defect in the goods which he concealed when making the contract. Jones on Evidence (3rd Edition, 1924), Section 181, page 245. See also *United States* v. *Denver & R. G. R. R.*, 191 U. S. 84, 92.

THE FEDERAL BILLS OF LADING ACT REFERRED TO BY THE CIRCUIT COURT OF APPEALS SPECIFICALLY

STATES IN ITS FIRST SECTION THAT IT DOES NOT APPLY TO A CASE (LIKE THE PRESENT) OF A VOYAGE FROM A FOREIGN PORT TO THE UNITED STATES.

The Circuit Court of Appeals in its opinion, said (Record, p. 239):

> "The bills of lading in the instant cases were straight bills of (fol. 497) lading. The Act of August 29, 1916, known as the Bills of Lading Act, declares 'That a bill in which it is stated that the goods are consigned or destined to a specified person is a straight bill.' 39 Stat. L. p. 539, sec. 2. And the Act makes straight bills non-negotiable and order bills negotiable. Section 29 of the Act provides that a straight bill cannot be negotiated free from existing equities. Where the shipper names another as consignee the title to the goods is in the person so named. *George F. Hinrichs, Inc.* v. *Standard Trust & Savings Bank,* 279 Fed. 382, 386. If the consignee in a straight bill pays the consignor for the goods before he receives them, or directs his banker to pay for him on the presentation of a clean bill of lading he pays at his own risk. If the goods reach him in damaged condition he cannot hold the ship liable unless he can show that the damaged condition of the merchandise was occasioned by the ship's default. In the instant cases no such default on the part of the ship is shown."

But the enacting clause (the first section) of the Bills of Lading Act provides as follows:

> "Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That bills of lading issued by any common carrier for the transportation of goods in any Territory of the United States, or the District of Columbia, or from a place in a State to a place in a foreign country, or from a place in one State to a place in another State, or *from* a place in one State *to a place in* the same State through another State or *foreign country,* shall be governed by this act."

The Act by its very terms is inapplicable to a case like the present, of a voyage from a foreign port to a United States port. In this respect the Act differs from the Harter Act. *Knott* v. *Botany Mills,* 179 U. S. 69.

See, also, page 55 of this brief.

THE SUGGESTION OF THE LOWER COURT THAT, ALTHOUGH THE FACTS JUSTIFY A RECOVERY, THE PARTICULAR FORM OF THE PRESENT SUIT IS IMPROPER, IS IN CONFLICT WITH THE DECISIONS OF THIS COURT THAT THE FORM OF THE ACTION IN ADMIRALTY IS IMMATERIAL.

The suggestion in the opinion of the Circuit Court of Appeals that although the facts show a cause of action by the petitioners against the

respondent Compania Trasatlantica or the *Isla de Panay,* the petitioners cannot recover as the suit should be brought in another form for fraud, is, we respectfully submit, in conflict with the decision of this Court in *Dupont* v. *Vance,* 19 Howard (U. S.) 162, that in the Admiralty the form of action is immaterial, provided the facts show a cause of action in favor of the libellant. In the *Dupont* case the suit was for cargo damage, and this Court permitted a recovery as if the action were for general average contribution. Moreover, this Court and the Circuit Courts of Appeals of the various Circuits have often held that in Admiralty the form of action is immaterial. *The Syracuse,* 12 Wallace (79 U. S.) 167, 173; *The Gazelle,* 128 U. S. 474, 487; *Davis* v. *Adams,* 102 Fed. 520, 523 (C. C. A. 9); *Richmond* v. *New Bedford,* Fed. Cases No. 11,800; *The Spica,* 289 Fed. 436, 440 (C. C. A. 2); *Dampskibs* v. *Tropical Co.,* 281 Fed. 740, 742 (C. C. A. 2); *The Volunteer,* 149 Fed. 723 (C. C. A. 2); *The Kalfarli,* 277 Fed. 391, 393 (C. C. A. 2); *The Prudence,* 204 Fed. 66, 69 (C. C. A. 4); *Argos* v. *Buffalo,* 223 Fed. 581, 589 (C. C. A. 6); *Harvard Law Review,* vols. 14, page 464; 15, pages 63 and 418; 19, page 462; and 12, page 501.

The letters of indemnity were offered in evidence by the ship, apparently to show that the casks were in bad external condition when accepted for carriage (Record, pp. 146, 147, 148, 220 and 221). Therefore the claimant of the ship should not be heard to object to a reference

to them. Circuit Judge Ward, speaking for the Circuit Court of Appeals for the Second Circuit, in *Higgins* v. *Anglo-Algerian Steamship Company,* 248 Fed. 386, 389, dealing with a similar situation, said:

> "The respondent insists that, as the libel is founded on contract on the bill of lading, nothing being said about fraud, it would be allowing the libellants to recover on a new and different cause of action if the case were disposed of on that ground. The answer is the respondent itself introduced all the evidence showing the fraud."

The taint of fraud is not in the petitioners' case, but in the claimant's defense. The evidence of fraud, in addition to the letters of indemnity, was introduced by the ship. See especially the testimony, on re-direct examination, of the captain of the *Isla de Panay* (at page 146 of the record), that the bills of lading were issued by the claimant without "a note on them" for the purpose of enabling the shippers to "pass" them to "a banking house and insurance company that they [the goods] have been shipped by the shipper in apparent good order and condition."

The evidence introduced by the ship in defense showed not merely bad condition of the casks, when accepted for carriage, but knowledge by the shipowner of that bad condition, and a deliberate concealment of the fact for the purpose of cooperating with third persons in inducing the innocent consignees to purchase the shipowners' bills of lading in due course as representing casks shipped apparently in good condition.

POINT II.

The decision of the Circuit Court of Appeals, *sua sponte*, without suggestion of counsel, that the *Isla de Panay* was not liable *in rem* is in direct conflict with the decision of this Court in *Bulkley* v. *Naumkeag Steam Cotton Company*, 24 Howard 386, which is not mentioned in the opinion of the Circuit Court of Appeals. It also inadvertently overlooks the facts that the bills of lading were issued in the name of the *Isla de Panay* and were not delivered to the shippers until after the casks of olives had been loaded on board the *Isla de Panay* on November 4th and 5th and that they were actually signed not by the Captain of the *Mogador* but by Jose Benjumea, a duly authorized agent of the Captain of the *Isla de Panay*.

The Circuit Court of Appeals in its opinion in this case said:

> "It is to be kept in mind throughout this opinion that these suits are not *in personam* against the owners of the vessel but they are *in rem* against the ship. If a libellant has a claim against the owners of a ship personally as well as against the ship he may ordinarily enforce it by uniting the two and bring his libel *in personam* and *in rem*. But that has not been done in the pending suits. The (fol. 490) libels allege that there was placed on board the steamship at Cadiz 'in good order and con-

dition' certain merchandise to be delivered to the libellants at the port of New York 'in like good order and condition as when shipped.' They allege that when the goods were discharged in New York they were not in like good order and condition as when shipped but badly damaged.

Now it is evident from what has been already stated that this court is abundantly satisfied that the goods when they were put on board the *Panay* were not in good order and condition but were in very bad order and condition because they were packed in insufficient containers. It is also clear that when the merchandise arrived in New York it was badly damaged but that the damage was not due to faulty stowage or negligent handling by the ship. It also appears that the bills of lading were not signed by any officer of the *Panay* but bore the signature of the captain of the *Mogador*. And that the merchandise at the time it was placed on the *Mogador* was in casks which were seen to be so old, weak and defective that those in charge at Seville objected to accepting them and the shippers, thereupon, offered letters of guarantee to take the place of any notations on the bills of lading, a practice which appears to be quite common in Spain. Under these circumstances we do not see how the libel can be maintained against the *Panay*" (Record, pp. 235, 236).

We submit that the decision of the Circuit

Court of Appeals is in direct conflict with the decision of this Court in the case of *Bulkley v. Naumkeag Steam Cotton Company*, 24 Howard (U. S.), 386, and also assumes facts not in the Record. In the *Bulkley* case, as here, the ocean vessel lay at a place at some distance from the town or place where the merchandise was tendered to the owner of the ocean vessel for shipment. In that case the ocean vessel, the barque *Edwin* lay outside "the bar" at the entrance to Mobile Bay, about thirty miles (according to the charts and Bowditch) from Mobile City where the cotton was tendered for shipment. The master of the barque "employed the steamer *M. Streck*" (24 Howard 386, 390) to bring the cotton from Mobile City down to the bay to the barque. In that case, as here, a usage was shown of lightering the goods from the place of shipment to the ocean vessel. There, as here, the ocean vessel, because of her deep draught, was unable to go to the place where the goods were delivered for shipment, and a steam lighter was hired to carry the goods from such place to the vessel. There, as here, a bill of lading was issued in the name of the ocean vessel. This Court held in the *Bulkley* case that delivery of the goods to the river steamer was a delivery to the master of the ocean vessel, and that the carriage by the river steamer to the ocean vessel was part of the contract voyage, for the due execution of which the ocean vessel was liable *in rem*. In disposing of reasons like those advanced by the Circuit Court

of Appeals in support of its decision, this Court said:

> "It is insisted, however, that the vessel is exempt from responsibility upon the ground that the one hundred bales were never laden on board of her, and we are referred to several cases in this Court and in England in support of the position. But it will be seen, on reference to these cases, the doctrine was applied, or asserted, upon a state of facts wholly different from those in the present case. In the cases where the point was ruled, the goods were not only not laden on board the vessel, but they never had been delivered to the master. There was no contract of affreightment binding between the parties, as there had been no fulfillment on the part of the shipper, namely, the delivery of the cargo.
> * * *
>
> In the present case THE CARGO WAS DELIVERED IN PURSUANCE OF THE CONTRACT, THE GOODS IN THE CUSTODY OF THE MASTER, AND SUBJECT TO HIS LIEN FOR FREIGHT, AS EFFECTUALLY AS IF THEY HAD BEEN UPON THE DECK OF THE SHIP, THE CONTRACT CONFESSEDLY BINDING BOTH THE OWNER AND THE SHIPPER; and, unless it be held that the latter is entitled to his lien upon the vessel also, he is deprived of one of the privileges of the contract, when, at the same time, the owner is in the full enjoyment of all those belonging to his side of it.
>
> The argument urged against this lien of the shipper seems to go the length of main-

taining, that in order to uphold it there must be a physical connection between the cargo and the vessel, and that the form of expression in the cases referred to is not to be taken in the connection and with reference to the facts of the particular case, but in a general sense, and as applicable to every case involving the liability of the ship for the safe transportation and delivery of the cargo. But this is obviously too narrow and limited a view of the liability of the vessel. There is no necessary physical connection between the cargo and the ship, as a foundation upon which to rest this liability. The unloading of the vessel at the port of discharge, upon the wharf, or even the deposit of the goods in the warehouse, does not discharge the lien, unless the delivery is to the consignee of the cargo, within the meaning of the bill of lading; and we do not see why the lien may not attach, when the cargo is delivered to the master for shipment before it reaches the hold of the vessel, as consistently and with as much reason as the continuance of it after separation from the vessel, and placed upon the wharf, or within the warehouse. In both instances the cargo is in the custody of the master, and in the act of conveyance in the execution of the contract of affreightment. We must look to the substance and good sense of the transaction; to the contract, as understood and intended by the parties, and as explained by its terms, and the attending circumstances out

> of which it arose, and to the grounds and reasons of the rules of law upon the application of which their duties and obligations are to be ascertained, in order to determine the scope and extent of them; and, in this view we think no well-founded distinction can be made, as to the liability of the owner and vessel, between the case of the delivery of the goods into the hands of the master at the wharf, for transportation on board of a particular ship, in pursuance of the contract of affreightment, and the case as made, after the loading of the goods upon the deck of the vessel; the one a constructive, the other an actual possession; the former, the same as if the goods had been carried to the vessel by her boats, instead of the vessel going herself to the wharf." (Capitalization our own.)

This decision has been consistently followed and has been recognized as one of the leading admiralty decisions of this Court (see Ames' Cases on Admiralty); *Insurance Company of North America* v. *North German Lloyd Insurance Company*, 106 Fed. 973; *The Pokanoket*, 161 Fed. 383; *Pearce* v. *The Thomas Newton*, 41 Fed. 106.

This Court recently had occasion, in the case of *Osaka Shosen Kaisha* v. *Pacific Export Lumber Co.*, (*The Saigon Maru*), 260 U. S. 490, to approve the decision in the *Bulkley* case on the ground that the master, through his agent, had possession of the merchandise with the power of asserting a lien.

In reaching its decision on this point, moreover, the Circuit Court of Appeals assumed a state of facts not justified by the record and not found by the District Court or even suggested by opposing counsel. As we have stated, the point was not raised by opposing counsel but was passed upon by the Court without notice to any counsel and without an opportunity for argument.

The bills of lading in the present case show on their faces that the owners of the *Isla de Panay* acknowledge receipt of the goods on board the steamship *Isla de Panay*, and, in so far as innocent purchasers are concerned, they give the appearance of being signed by the master of the *Isla de Panay* (Record, Bill of Lading, pp. 214-215 and 218). It is specifically admitted that the casks were received from the shippers by an agent of the *Isla de Panay* (Record, p. 144). The bills of lading were not issued by the captain of the *Mogador*, as stated by the Circuit Court of Appeals in its opinion, at page 232 of the record. The bills of lading, as already indicated, recited "shipped on board the Spanish steamer *Isla de Panay*" (Record, p. 215), and the rubber stamp signatures "A. Pastrana, El Capitan" (Record, p. 218) and "The Agent of the Steamer (Round Stamp) Compania Trasatlantica, Sevilla Agency" (Record, p. 218) were affixed by general agent Benjumea of the owner of the *Isla de Panay*, who testified that he had authority in the absence of the captain of the *Isla de Panay* to issue bills of lading for the *Isla de Panay* (Record, p. 211).

Pastrana testified:

> "I do not issue bills of lading" (Record, p. 168); "The bills of lading were signed by a rubber stamp bearing my signature. I suppose they were not delivered by the agency until the letter of guarantee had been received" (Record, p. 168); "What I did was to accept these casks aboard my vessel following written instruction from the agent having previously consulted with the agent regarding their bad condition. The bills of lading are exclusively issued by the agent and are signed with a rubber stamp bearing my name. The signatures on claimant's exhibits numbers 2, 3 and 4 shown to me by the commissioner are those of the rubber stamp bearing my name and I acknowledge them to be mine. I did not issue, as before stated, the bills of lading, this being done by the agent only, but I knew that on account of the bad condition in which the casks were received, the agent after being informed by me of their condition, demanded and obtained of the shippers letters of guarantee relieving the Compania Trasatlantica from all responsibility for damaged condition on arrival at port of destination" (Record, p. 152).

Jose Benjumea testified:

> "I was acting in the capacity of agent of the Compania Trasatlantica through the power of attorney, copy of which is annexed hereto and marked exhibit No. 1,

> granted me by my brother Eduardo Benjumea who was appointed by the head office" (Record, p. 208); "The reason why the copies of the bill of lading No. 4 for New York covering the 69 casks referred to above which were signed with a rubber stamp bearing the name of the captain of the *Mogador* as though these casks had been transported to Cadiz by the *Mogador* instead of by rail as they finally were shipped, was due to their having been admitted in the belief that they could be transported in the *Mogador*" (Record, p. 211); "The only importance attached to this procedure is the bills of lading having been signed by the Captain of the *Mogador* instead of by the Captain of the *Isla de Panay* or *myself as agent due to the latter's absence.* The company had absolute confidence in both these captains" (Record, p. 211).

We submit that such bills of lading are as much the act of the master of the *Isla de Panay* as if the master of the *Isla de Panay* had personally signed them.

See *The Delaware,* 14 Wallace (81 U. S.), 579, 600, where this Court said:

> "Regularly the goods ought to be on board before the bill of lading is signed, but if the bill of lading, through inadvertence or otherwise, is signed before the goods are actually shipped, as if they are received on the wharf or sent to the ware-

house of the carrier, or are delivered into the custody of the master or other agent of the owner or charterer of the vessel and are afterwards placed on board, as and for the goods embraced in the bill of lading, it is clear that the bill of lading will operate on these goods as between the shipper and the carrier by way of relation and *estoppel*, and that the rights and obligations of all concerned are the same as if the goods had been actually shipped before the bill of lading had been signed. Such an instrument is twofold in its character; that is, it is a receipt as to the quantity and description of the goods shipped, and a contract to transport and deliver the goods to the consignee or other person therein designated, and upon the terms specified in the same instrument." (Italics ours.)

In *The City of Alexandria*, 28 Fed. 202, Judge Wallace, an able Admiralty Judge, held that authority to accept delivery for and to bind the vessel may be conferred by an express grant, or the conduct and relations of the parties may establish such an apparent authority that the carrier will be estopped from denying its existence to a shipper who has been misled thereby, and that, as delivery of the merchandise to the lighter was equivalent to delivery to the owners of the steamer, the steamer was liable *in rem*, notwithstanding the loss occurred

before the tobacco, which was the merchandise damaged on the *City of Alexandria*, was actually laden on board of that vessel. The point was urged in that case that the master had not, in fact, personally signed the bill of lading. Judge Wallace, in disposing of this point, said (at p. 206):

> "Inasmuch as the master is but the agent for the owner of the vessel, this case cannot be distinguished from the case cited (the *Bulkley* case), if the owners themselves authorized the libellants to deliver their goods to the lighters of Mendez & Co., and have treated such a delivery as a delivery to their steamer."

Moreover, here the claimant and owner of the *Isla de Panay* bases its defense on an exception in the bill of lading. It is, therefore, estopped to deny the agency of the person who actually signed them.

In the *Isle de Sumatra*, 286 Fed. 437, the syllabus reads:

> "Where a shipowner relies on exceptions in the bill of lading to relieve it from liability for damage to cargo it is estopped to deny the agency of the person who signed the bills of lading in its behalf and has the burden to prove his want of authority to make a further contract with respect to the shipment."

United States Circuit Judge Ward said (286 Fed. 437, 438):

> "Agency may be proved circumstantially as well as expressly. * * * The authority of Ibanez to act for the steamer is shown by the fact that he did bring her to Gardia for the onions, that he prevented her master from taking shipments of onions which had been offered by other parties, and *that he signed the bills of lading for the onions shipped* by Carda consigned to Schnell & Co. *As the shipowners rely upon exceptions in the bills of lading, they are estopped from denying the authority of Ibanez as to them.*"

And in *The Taurus,* 286 Fed. 435, the ship was held liable *in rem* because—

> "The bills of lading were signed by the general agent of the steamer."

In *Stumore* v. *Breen* (1887), 12 Appeal Cas. 698, 702, the House of Lords of England, speaking through Lord Watson, said:

> "Of course the owner may supersede in so far the functions of the master, by committing to another agent the power or the duty of settling the whole terms of the bills of lading, including the fact of shipment and also the date."

The owner of the *Isla de Panay* accepted delivery of the casks to its lighter *Mogador*, as a

delivery to the *Isla de Panay.* This fact cannot be controverted, because the bills of lading as issued by the owners of the *Isla de Panay* admit in words the delivery to the *Isla de Panay.* Moreover, the bills of lading were not delivered to the shippers until after the olives had been laden on board the *Isla de Panay.*

Captain Muslera of the *Isla de Panay* testified:

> "Q. How many hours was this ship at Cadiz? A. One day.
>
> Q. How many hours? A. Arriving in the morning of the 4th [of November, 1917] and sailed in the afternoon of the 5th, about 30 hours.
>
> Q. When were these olives put on board? A. Day and night" (Record, p. 81).

There were only 354 casks in all three of the petitioners' shipments. The bills of lading specifically state (see Bill of Lading, Record, p. 215) that the casks were "shipped on board the Spanish steamship *Isla de Panay.*"

Although the bills of lading are incorrectly dated "Seville, October 27th, 1917," both Agent Benjumea and Captain Pastrana testified that they were in fact not issued to the shippers until after letters of indemnity had been given by the shippers on November 5th and 8th, 1917.

Agent Benjumea testified:

> "I received the three letters of guarantee already mentioned before making delivery of the bills of lading to the shippers"

(Record, p. 214); "The bills of lading were not delivered to the shippers until the corresponding letters of guarantee had been given to the company's agent" (Record, p. 212); "The letters of guarantee were issued at the request of the shipper to take the place of notations on the bills of lading which they wanted to have clean" (Record, p. 212); "I issued the bills of lading only" (Record, p. 214); "The bills of lading were signed with a rubber stamp bearing my signature. I suppose they were not delivered by the agency until the letter of guarantee had been received" (Record, p. 168).

Two of the letters of guarantee were given on November 5th and the third on November 8th, 1917 (Record, pp. 220 and 221). These letters were introduced by counsel for the *Isla de Panay*. The uncontradicted evidence therefore shows that the bills of lading in the present case were not issued to the shippers until the goods were on board the *Isla de Panay* on November 5th and 8th, 1917.

Moreover, the *Isla de Panay's* own evidence shows that none of the petitioner's casks was broken until they were being loaded on and carried and discharged by the *Isla de Panay*. The evidence relating to their unbroken but "very bad condition" when accepted for carriage by the *Isla de Panay* is recited in the Statement of Facts on pages 9 to 11 of this brief (Record, pp. 75, 79, 80, 81, 82, 83, 87, 88, 96, 107, 152, 154, 157 and 158). The evidence relating to their broken condition

with contents coming out "all over the dock" (Record, p. 85) when discharged by the *Isla de Panay* at New York is recited on pages 12 and 13 of this brief.

The breakage of the casks having taken place while in the *Isla de Panay's* custody, she, like any bailee or carrier, is liable *in rem* irrespective of the bills of lading. *Railroad Co.* v. *Swift*, 12 Wall. (U. S.) 262; *Osaka Shosen Kaisha* v. *Pacific Export Lumber Co. (The Saigon Maru)*, 260 U. S. 490.

We have stated these facts in some detail, because they show how similar the present case is to the *Bulkley* and the *Osaka* cases. The bills of lading were signed on behalf of the master of the *Isla de Panay* (Record, p. 215). The goods were damaged while in the custody of the ship (p. 12 of this brief). The lighterage was merely a convenient method to permit the owners of the *Isla de Panay* to accept the cargo for her at Seville for carriage by her to New York, without the loss of time and possible damage of taking so large a steamer up the river to Seville. These conclusions irresistibly follow from the claimants' own evidence and are those which it is manifest that the claimants desired those dealing in its bills of lading to form. Otherwise the insertion by the claimant in the bills of lading of the fact that the goods had been shipped on board the *Isla de Panay* is misleading. It is of no significance that Cadiz was some seventy miles from Seville. In the *Bulkley* case the bar of Mobile Bay, where the

ocean carrier lay to receive cargo shipped at Mobile City, appears from the charts and Bowditch to be about thirty miles from Mobile City. In that case also a steamer was employed as a lighter to take cargo from the City to the ocean carrier. This Court had no difficulty in holding that when bills of lading were issued by the master, the ship was responsible. The only difference here is that the bills of lading were signed by the agent.

> "The only importance attached to this procedure is the bills of lading having been signed by the captain of the *Mogador* instead of by the captain of the *Isla de Panay* or myself as agent due to the latter's absence" (Record, p. 211).

Thus it appears that the two cases are on all fours. The only distinction is one favorable to our case, viz., that the breakage and consequent loss of the cargo of the *Isla de Panay* occurred after the cargo was delivered to her; whereas in the *Bulkley* case the damage occurred before the cotton reached her deck. Under these circumstances, we respectfully submit that the Circuit Court of Appeals was clearly in error when it held that the *Isla de Panay* was not liable *in rem* to these petitioners.

THE FICTION OF *IN REM* LIABILITY SHOULD NOT BE USED TO CLOAK A FRAUD OF THE OWNER OF THE SHIP WHERE HE HAS PERSONALLY APPEARED AND DEFENDED AS CLAIMANT.

In the course of its opinion, the Circuit Court of Appeals carried the fiction of *in rem* liability to the extreme of holding that as the letters of indemnity were addressed to the owner of the ship and not to the ship herself or her master they could not affect her liability. The Court said (Record, p. 240):

> "These letters of guarantee were not addressed to the *Panay* or to its Captain or Master, but to the Compania Transatlantica, Seville, and were dated November 5, 1917, which was the day on which the *Panay* sailed from Cadiz. As neither the Captain or any other officer of the *Panay* ever had anything to do with these letters or even saw them until they saw them in New York at or about the time of the trial we confess inability to see how the letters impose upon the ship a liability which otherwise does not exist. So far as they could have any effect they were intended to protect from liability, not to impose it."

It is difficult to understand what the Court had in mind when it suggested that "these letters of guarantee were not addressed to the *Panay* or to its captain or master, but to the Compania Trasatlantica" (Record, p. 240). The *Panay* is only an inanimate object, and the captain or master merely an employee of the Compania Trasatlantica. Furthermore, that Company claimed the *Panay* in the present suit as sole owner, and has itself introduced the letters of guarantee and the bills of lading as relating to

the liability of the *Panay*. The conclusion of the Circuit Court of Appeals wholly ignores the fact that the owner of the *Isla de Panay*, to whom the letters of guarantee were addressed, voluntarily made itself a party to this suit by appearing as owner and claimant of the vessel. The answer is in its name as owner and claimant. Consequently, it is as much a party to the suit as if suit had been brought against it in the first instance. Certainly where the elements of fraud exist, the fact of the form of action should not relieve a person guilty of such fraud from the consequences of his guilt. No man should be permitted to come into court, saying "It is true that I have been guilty of fraud, but I am not to be held liable for the consequences of my fraud, because this is a suit against my property and not against me." See *The Eugene F. Moran*, 212 U. S. 466, 474; *The Western Maid*, 257 U. S. 419.

It seems impossible to reconcile the decision of the Circuit Court of Appeals with the decision of the same Court (but composed of Circuit Judges Wallace, Lacombe and Cox) in the case of *The Minnetonka*, 146 Fed. 509, 515. In that case, a suit *in rem* against a ship, the Court permitted a recovery *in personam* against the claimant of the sum of $2,000 in excess of the *in rem* liability of $5,000. The Court said (146 Fed. 515):

> "The question, then, is, shall the libelant be precluded from recovering the full amount of her damages because, through inadvertence, she stated them in her pleading

at $2,000 less than they actually are? Were this an ordinary action at common law or in equity, to state the question would be to answer it. Amendments conforming the pleadings to the proof are constantly being permitted under similar conditions. No case has been cited and we have been unable to find one preventing the court, sitting in admiralty, from exercising a sound discretion in allowing amendments where the object is merely to correct an estimate as to value, involving the introduction of no new facts or change in the cause of action. *The Atlantic Transport Company appeared in the action as claimant, and it was within the power of the court to direct a decree against it for the balance of the libelant's loss.* A court of admiralty has powers akin to those of a court of equity, and should not be hampered in its efforts to reach a substantial justice by the inexorable rules invoked by the claimant. As it was said by the Supreme Court:

> 'It is objected that the libel does not specifically charge this antecedent negligence as a fault. This is true, and the libel is defective on that account, but in admiralty an omission to state some facts which prove to be material, but which cannot have occasioned any surprise to the opposite party, will not be allowed to work any injury to the libelant if the court can see there was no design on his part in omitting to state them. There

> is no doctrine of mere technical variance in the admiralty, and, subject to the rule above stated, it is the duty of the court to extract the real case from the whole record and decide accordingly.' *The Syracuse*, 79 U. S. 167, 20 L. Ed. 382." (Italics ours.)

Here the situation is distinctly more favorable to the libellants than it was in the case of *The Minnetonka*. In that case the question was whether the shipowner, by a general appearance in a suit *in rem*, as owner and claimant of the *res*, had submitted itself to personal liability in excess of the sum for which it had bonded the vessel. The Court held in the affirmative. But, in the present case, the only recovery sought is a sum less than that for which the claimant has bonded the vessel. That the Court had power to enter a decree against the claimant to this extent appears to have been undisputed in *The Minnetonka* case. The principle of the decision in the Second Circuit, in *The Minnetonka*, has also been recognized in the Third Circuit in *The Southwark*, 129 Fed. 171 (E. D. Pa.).

There is therefore no reason why the Court should aid the claimant by invoking a strained construction of the *in rem* fiction.

CONCLUSION.

The decision below is that a carrier by remaining silent when under a duty to speak can issue bills of lading in a form which he knows will aid

in deceiving a buyer, and, when the buyer has been deceived, can use the fact concealed as an excuse for the breach of duty. Such a decision if permitted to stand will not only seriously impair the value of bills of lading as trustworthy documents, but will tend to induce shipowners generally to issue bills of lading in a form which Congress by Section 4 of the Harter Act has expressly disapproved.

Nor is it any answer to say, as the Circuit Court of Appeals did of its own motion, that because the casks were carried to the *Isla de Panay* by one of her owner's river steamers there is no liability of her owner in these suits inasmuch as it is claiming and defending here only as owner of the *Isla de Panay*. Such a decision overlooks the following facts:

1. The bills of lading were issued not by the captain of the river steamer, but by one of the *Isla de Panay's* authorized agents, expressly in the name of the *Isla de Panay;*

2. The bills of lading were not delivered to the shippers until after receipt of the casks on board the *Isla de Panay;*

3. The breakage of the casks took place not on the river steamer, but while in the custody of the *Isla de Panay;* and

4. This Court has decided in the *Bulkley* case (24 Howard 386) that river steamship lighterage

to seaport under the control and at the expense of an ocean steamer is part of the ocean steamer's carriage service, and that for loss of cargo during the lighterage the ocean steamer is liable *in rem*.

Dated, New York City, January 9, 1925.

Respectfully submitted,

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Appendix.

The Harter Act.

(Act of Feb. 13, 1893, ch. 105; U. S. Comp. Stats. 1916, secs. 8029 to 8035.)

An Act relating to the navigation of vessels, bills of lading and to certain obligations, duties and rights in connection with the carriage of property.

Be it enacted by the Senate and House of Representatives of the United States of America, in Congress assembled that:

"Sec. 1. It shall not be lawful for the manager, agent, master or owner of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to insert in any bill of lading or shipping document any clause, covenant, or agreement whereby it, he, or they shall be relieved from liability for loss or damage arising from negligence, fault, or failure in proper loading, stowage, custody, care, or proper delivery of any and all lawful merchandise or property committed to its or their charge. Any and all words or clauses of such import inserted in bills of lading or shipping receipts shall be null and void and of no effect.

Sec. 2. It shall not be lawful for any vessel transporting merchandise or property from or between ports of the United

States of America and foreign ports, her owner, master, agent or manager to insert in any bill of lading or shipping document any covenant or agreement whereby the obligations of the owner or owners of said vessel to exercise due diligence, properly equip, man, provision, and outfit said vessel, and to make said vessel seaworthy and capable of performing her intended voyage, or whereby the obligations of the master, officers, agents, or servants to carefully handle and stow her cargo and to care for and properly deliver same, shall in any wise be lessened, weakened, or avoided.

Sec. 3. If the owner of any vessel transporting merchandise or property to or from any port in the United States of America shall exercise due diligence to make the said vessel in all respects seaworthy and properly manned, equipped, and supplied, neither the vessel, her owner or owners, agent, or charterers shall become or be held responsible for damage or loss resulting from faults or errors in navigation, or in the management of said vessel, nor shall the vessel, her owner or owners, charterers, agents, or master, be held liable for losses arising from dangers of the sea or other navigable waters, acts of God, or public enemies, or the inherent defect, quality, or vice of the thing carried, or from insufficiency of package, or seizure under legal process, or for loss resulting from any act or omission of the shipper or owner of the

goods, his agent or representative, or from saving or attempting to save life or property at sea, or from any deviation in rendering such service.

Sec. 4. It shall be the duty of the owner or owners, master or agent of any vessel transporting merchandise or property from or between ports of the United States and foreign ports to issue to shippers of any lawful merchandise a bill of lading, or shipping document, stating, among other things, the marks necessary for identification, number of packages, or quantity, stating whether it be carrier's or shipper's weight, and apparent order or condition of such merchandise or property delivered to and received by the owner, master, or agent of the vessel for transportation, and such document shall be *prima facie* evidence of the receipt of the merchandise therein described.

Sec. 5. For a violation of any of the provisions of this act the agent, owner, or master of the vessel guilty of such violation, and who refuses to issue on demand the bill of lading herein provided for, shall be liable to a fine not exceeding two thousand dollars. The amount of the fine and costs for such violation shall be a lien upon the vessel, whose agent, owner, or master is guilty of such violation, and such vessel may be libeled therefor in any district court of the United States, within whose jurisdiction the vessel may be found. One-half of such penalty shall go to the party injured by

such violation, and the remainder to the Government of the United States.

Sec. 6. This act shall not be held to modify or repeal sections forty-two hundred and eighty-one, forty-two hundred and eighty-two and forty-two hundred and eighty-three of the Revised Statutes of the United States, or any other statute defining the liability of vessels, their owners, or representatives.

Sec. 7. Sections one and four of this act shall not apply to the transportation of live animals.

Sec. 8. That this Act shall take effect from and after the first day of July, eighteen hundred and ninety-three."

Approved, February 13th, 1893.